IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.KULASEKARAN

SA.No.474/1996

Govindasami Naidu — Appellant [Plaintiff].

Vs.

1.Shanmuga Nattar
2.Velmurugan — Respondents [Defendants].

Prayer:- This Second Appeal is filed against the judgement and decree dated 3.1.1995, made in AS.No.76/1993, on the file of the Subordinate Judge, Villupuram, confirming the judgement and decree made in OS.No.855/1985 dated 3.12.1992, on the file of the District Munsif, Tirukoilur.

For Appellant : Mr.V.Raghavachari

For Respondents : Mr.J.Ramakrihnan for
M/s.Sarvabhauman & Associates for R.1
Ms.Mythily Suresh-R2

JUDGEMENT

1.The Plaintiff, who succeeded before the trial court, but lost his case before lower appellate court, is the appellant in this second appeal.

2.The appellant herein filed the suit in OS.No.855/1985, before the District Munsif, Tirukovilur, for eviction against the 1st respondent herein. In the said suit, the 1st respondent filed a Written Statement denying the title of the appellant herein and stated that he was the tenant under the 2nd respondent herein and thereafter, the 2nd respondent herein came to be impleaded in the said suit and the said suit was decreed by the trial court. The appeal filed as against the same in AS.No.76/1993 before the Subordinate Judge, Villupuram, by the 2nd respondent alone was allowed, setting aside the judgement and decree of the trial court and no first appeal has been filed by the 1st respondent herein. Aggrieved by the judgement and decree of the lower appellate court, this second appeal has been filed by the Plaintiff.

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3.The case of the appellant herein was that he was the owner of the suit property; that the 1st respondent herein entered into an oral tenancy agreement with him for a monthly rent of Rs.100/-; that the 1st respondent paid the rent upto 31.3.1984 and from 1.4.1984, he had committed default in paying the rent and the appellant herein issued a notice of termination of the tenancy and thereafter, filed the suit for eviction against the 1st respondent.

4.The case of the 1st respondent herein was that the suit property originally belonged to the mother of the appellant herein, who executed a Will dated 29.11.1971, bequeathing the suit property in favour of the appellant's wife as well as the 2nd respondent herein; that the mother of the appellant herein died two years prior to the filing of the suit and the 2nd respondent herein acquired the suit property by virtue of the said Will and from 1978 onwards, the 1st respondent started paying the rent to the 2nd respondent; that the appellant had no right in the suit property.

5.The case of the 2nd respondent herein was that after the demise of the mother of the appellant, Thayarammal, he acquired the suit property with absolute right by virtue of the said Will; that the 1st respondent started paying rent from 1978 onwards to the 2nd respondent; that the appellant without establishing his ownership over the suit property, filed the vexatious suit hastily.

6.Before the trial court, the appellant herein marked Ex.A1 dated 31.5.1987, patta issued by the Tahsildar, Tirukovilur in the name of the appellant, Ex.A2 dated 9.7.1984, notice issued to the 1st respondent through the counsel of the appellant herein and Ex.A3, dated 10.7.1984, acknowledgement card of the 1st respondent and examined himself as PW.1 and one Ayyamperumal as PW.2 and the respondents neither let in any oral evidence nor marked any documents.

7.The trial court, after considering the oral and documentary evidence, found that the 1st respondent herein was the tenant under the appellant; that the patta was issued by the Revenue Authority concerned in favour of the appellant in respect of the vacant land, where he constructed a building; that thereafter he leased out the same to the 1st respondent; that the 2nd respondent has no right in the suit property; that both the respondents neither let in any oral evidence nor marked any documents to prove their claim in the suit property; that the appellant admitted that he did sign as a witness in the will dated 29.11.1971 executed by his mother in favour of the 2nd respondent and hence, the said Will is a genuine one, but the validity of the same could not be decided, since it was not produced; that the 1st respondent was liable to pay the arrears of rent of Rs.1,540/- to the appellant herein; that in view of the fact that the appellant had constructed a superstructure, he was entitled to seek the relief of recovery of possession from the 1st respondent; that the 2nd respondent had not proved that he leased out the suit property to

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the 1st respondent or received the rent from him; that the properties covered under the will was unable to be ascertained and ultimately, decreed the suit.

8. The lower appellate court set aside the judgement and decree passed by the trial court on the grounds that the appellant admitted that he attested the will dated 29.11.1971 and also the custody of the same was with him, but he failed to produce the same before the court for consideration; that the alleged relationship of landlord and the tenant between the appellant and the 1st respondent was not proved by the appellant; that before establishing the title of the suit property, the appellant had chosen to file the suit for recovery of possession and arrears of rent; that the finding of the trial court that the 2nd respondent was not the owner of the suit property was incorrect; that the notice issued under Section 106, terminating the tenancy of the 1st respondent was untenable in law; that in view of the fact that the 2nd respondent claimed his right under the will dated 29.11.1971, the case of the appellant that he was the owner of the suit property cannot be accepted and hence, the appellant was not entitled to the reliefs of recovery of possession and arrears from the 1st respondent.

9. This second appeal was admitted on the following substantial questions of law:-

   1. Whether the court below has not erred in law in failing to see that the 1st Defendant has denied the title of the Plaintiff and that he has forfeited the lease as per the provisions of Section 111(g) of the Transfer of Property Act and that therefore, he cannot raise the issue of want of proper notice to quit under Section 106 of the Transfer of Property Act?
   2. Whether the court below has not erred in holding that there is a doubt with regard to the title of the Plaintiff to the suit properties, when no oral and documentary evidence have been produced by the Defendants in support of their contentions and especially when the Plaintiff has clearly averred that the suit property is not the subject matter of the will?
   3. Whether the learned Subordinate Judge has not erred in entertaining the appeal by the 2nd Defendant when no relief is claimed against him and when he cannot be said to be aggrieved by the decree passed in OS.No.855/1985 on the file of the court of the District Munsif, Tirukoilur dated 3.12.1992?
   4. Whether the judgement and decree of the court of the Subordinate Judge, Villupuram in AS.No.76/1993 and dated 3.1.1995 in reversing the well considered judgement and decree of the court of the District Munsif, Tirukoilur in OS.No.855/1985 and dated 3.12.1992 is even otherwise illegal, incompetent, without jurisdiction and in any event liable to be set aside?

10. The learned counsel for the appellant herein has submitted that the lower appellate court ought not to have entertained the appeal filed by

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the 2nd respondent, since he was not an aggrieved person; that the 1st respondent denied the title of the appellant and set up the title in the 2nd respondent herein, thereby, he forfeited his lease and gave right to the appellant to determine the lease as per the provisions of the Section 111(g) of the Transfer of Property Act and hence, it is not open to the 1st respondent to raise the issue of want of proper notice under Section 106 of the said Act; that the appellant took a plea that the suit property was not the property covered under the said Will dated 29.11.1974, but in respect of which, no finding was given by the lower appellate court and hence, prayed for setting aside the judgement and decree of the lower appellate court.

11. The learned counsel for the 1st respondent has submitted that the 1st respondent was the tenant under the 2nd respondent; that admittedly, the appellant attested the will dated 29.11.1971 executed by his mother in favour of the 2nd respondent and custody of the same was with him; that after the death of his mother Thayarammal, the 1st respondent started paying rent only to the 2nd respondent; that the said facts were found mentioned in the Written Statement; that after filing of the Written Statement only, the appellant herein had chosen to file a petition to implead the 2nd respondent and accordingly, the 2nd respondent came to be impleaded in the suit; that the 2nd respondent also filed a Written Statement stating that he has absolute right in the suit property pursuant to the said will and hence, prayed for dismissal of this second appeal.

12. The learned counsel for the 2nd respondent has submitted that the suit property and the building constructed thereon originally belonged to the mother of the appellant, Thayarammal, who executed a Will dated 29.11.1971, bequeathing the suit property in favour of the wife of the appellant and the 2nd respondent; that after the demise of Thayarammal, the 2nd respondent was enjoying the suit property as the absolute owner; that the 2nd respondent leased out the same to the 1st respondent; that the suit was filed by the appellant for recovery of possession and arrears of rent from the 1st respondent, without proving his title; that though it was admitted by the appellant that he was one of the attestors of the said Will, which was also in his custody, the same was not produced by him before the courts below for consideration and hence, an adverse inference was drawn against him by the lower appellate court and considering the above said facts, the lower appellate court rightly set aside the judgement and decree of the trial court and hence, prayed for dismissal of this second appeal.

13. This court considered the arguments of the learned counsel on either side and the material records placed.

14. It is admitted that the mother of the appellant, Thayarammal executed the Will dated 29.11.1971, bequeathing certain properties in favour of the 2nd respondent. It is also an admitted fact that the said Will is in the custody of the appellant herein. The case of the 2nd respondent is

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that the suit property was bequeathed by Thayarammal in his favour, which is denied by the appellant herein, stating that the property covered under the said Will is not the suit property. It is not explained by the appellant as to why the said Will was not produced before the courts below for consideration.

15.Section 114 of the Indian Evidence Act says:-

> "Court may presume existence of certain facts:- The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

16.It is evident from the Section 114 of the said act that the court is bound in every instance to presume against that party on whom the burden of proof is directed to lie. The said section also declares that the court may, in all cases whatever, draw from the facts before it, whatever inferences it thinks just. Nine of the most important of them are given by way of illustrations to the Sections. Illustration (g) deals with the presumption arising from withholding evidence. The conduct of the person withholding the evidence may be attributed to a supposed consciousness that the evidence, if produced, would operate against him.

17.In the decision rendered by the Supreme Court in case of Sushil Kumar Vs. Rakesh Kumar (AIR-2004-SC-230), wherein it was held in paragraph 32 as under:-

> "The age of a person, in an election petition has to be determined not only on the basis of the materials placed on records but also upon taking into consideration the circumstances, attending thereto. The initial burden to prove the allegations made in the election petition although was upon the lection petitioner but for providing the facts which were within the special knowledge of the respondent, but burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence, the question of onus of proof becomes academic. (See Union of India and others Vs. Sugauli Sugar Works (P) Limited (1976-3-SCC-32-Para14) and M/s.Cox and Kings (Agents) Limited Vs. Their Workmen and others (AIR-1977-SC-1666-Para 36). Furthermore, an admission on the part of a party to the lis shall be binding on him and in any event a presumption must be made that the same is taken to be established."

In view of the above said discussions, the adverse inference drawn that the property covered under the Will is the suit property by the lower appellate court is perfectly valid.

18.With regard to another argument advanced by the learned counsel for the appellant that neither the respondents let in oral evidence nor marked any documents i.e. the second substantial question of law, it is

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well settled that the Plaintiff must establish his case and he will not succeed automatically on the weakness of the Defendant as held in the case of Sayed Muhammed Mashur Kunhi Koya Thangal Vs. Badagara Jamayath Palli Dharas Committee and others (AIR-2004-SC-4365), by the Apex Court as under:-

> "8..... The Plaintiff could only succeed on the strength of its case and not on the weakness found in the case of the Defendant, if any..."

In view of the above said discussions, this court is of the view that the appellant as the Plaintiff has to prove his own case and that he will not succeed automatically on the ground that the respondents herein neither let in any oral evidence nor marked any documents, besides, this court confirms the adverse inference drawn by the lower appellate court. Accordingly, the second substantial question of law is answered against the appellant herein.

19.In view of the findings relating to the second question of law as given above, this court is of the view that the appellant has no right to issue a notice of termination to the 1st respondent and accordingly, the first substantial question of law is answered in favour of the respondents.

20.With regard to the third substantial of question of law, the argument of the learned counsel for the appellant is that the 2nd respondent is not the aggrieved person and hence, the first appeal filed by him is not maintainable in view of the provisions of Section 96 and Order 41 of CPC. The appellant herein, in the plaint, averred in paragraph 6(a) that **"2ஆம் பிரதிவாதியை கட்டுப்படுத்தி தீர்ப்பு பெற வேண்டிய சூழ்நிலை ஏற்பட்டு 2ஆம் பிரதிவாதியை இவ்வழக்கில் பார்ட்டியாக சேர்க்கபட்டுள்ளது"**. The said tamil version means, "it was necessitated to seek a decree binding on the 2nd respondent and hence, he was impleaded as party" The said tamil version makes it clear that the relief sought for in the suit is not only against the 1st respondent, but also the 2nd respondent.

21.Further, as rightly pointed by the learned counsel for the 2nd respondent, the trial court passed the decree that **"வாதிக்கு பாத்யமான தாவா சொத்தை 1ஆம் பிரதிவாதி காலி செய்து வாதி வசம் ஒப்படைக்கொடுக்க உத்தரவிடப்படுகிறது"**, which means that the 1st respondent was directed to vacate the suit property belonging to the appellant and hand over the same to him. Hence, it is evident from the said decree that the 2nd respondent was also an aggrieved party.

22.Section 96 of CPC does not enumerate the person, who can file an appeal. It is fundamental that in order to be entitled to file an appeal, the person must be aggrieved by and dissatisfied with the judgement.

23.In the case of Banarsi and others Vs. Ram Phal (AIR-2003-SC-1989), the Apex Court has held as under:-

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"8. Sections 96 and 100 of the CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. See Phoolchand and another Vs. Gopal Lal, 1967-3-SCR-153; Smt.Jatan Kanwar Golcha Vs. M/s.Golcha Properties (P) Limited, 1970-3-SCC-393. No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 of CPC provide for an appeal against the decree and not against judgement.

24.Considering the facts and circumstances of the case and in view of the above said discussions, this court is of the considered view that the 2nd respondent herein is an aggrieved person and hence, he is entitled to file an appeal. Accordingly, third substantial question of law is answered in favour of the 2nd respondent and against the appellant herein.

25.With regard to the fourth substantial question of law, this court is of the view that it is not touching the issue relating to law, but only relating to question of facts. The lower appellate court has given valid reasons for setting aside the judgement and decree of the trial court and hence, this issue is answered against the appellant.

26.In view the above said discussions made above, in all, this court is of the considered view that the judgement and decree of the lower appellate court is based on valid evidence and this second appeal deserves to be dismissed. This court also do not find any infirmity or illegality in the findings of the lower appellate court, warranting interference by this court.

27.In the result, this second appeal fails and the same is dismissed. No costs. The findings made in this case are only relating to the reliefs sought for by the parties. In case the parties approach for further reliefs, the same can be decided by the courts below, on merits, untrammeled uninfluenced by the findings of this court. No costs.

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2.The District Munsif, Tirukoilur

3.The Record Keeper, VR Section, High Court, Madras

4.+ 1 CC To M/s.Sarvabhauman Associates, Advocate SR NO.54933

+ 1 CC To Mr. V.Raghavachari, Advocate SR NO. 55123

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